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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 303

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DAUGHERTY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinions of the Circuit Court of Appeals are reported in 2 F. (2nd) 691 and (on rehearing) 4 F. (2nd) 344. The order of this Court granting the writ of certiorari is reported in 26 — U. S. —, 45 Sup. Ct. Rep. 508.

GROUNDS OF JURISDICTION

The judgment to be reviewed, bearing date of November 10, 1924, appears at R. 24. By its terms the Circuit Court of Appeals, while affirming the defendant's conviction, attempted to alter the sentence as imposed by the District Court. (R. 5.) The original sentence was for three terms

of five years each, to run *consecutively*. It was altered by the Circuit Court of Appeals to run *concurrently*. (R. 21, 24.) The Government seeks a reversal only of this latter portion of the judgment of the Circuit Court of Appeals, and a restoration of the sentence originally imposed.

The authority of this Court to grant certiorari in a criminal case at the suit of the Government was conferred by Section 240 of the Judicial Code. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157.) It is sustained by the recent decisions of this Court in *United States* v. *Gulf Refining Company* (26 — U. S. ——, 45 Sup. Ct. Rep. 597) and *United States* v. *Johnston* (26 — U. S. ——, 45 Sup. Ct. Rep. 496). The power of this Court to modify an erroneous judgment entered (in this case by the Circuit Court of Appeals) upon a lawful conviction is undoubted. Rev. Stats. 701. Act of March 3, 1891, c. 517, ss. 10–11 (26 Stat. 826, 829). Cf. *Ballew* v. *United States*, 160 U. S. 187.

STATEMENT

The defendant, James Daugherty, was indicted on April 6, 1923, for violation of section 2 of the Harrison Anti-Narcotic Act (Act of Dec. 17, 1914, c. 1, 38 Stat. 785, as amended by s. 1006 of the Act of Feb. 24, 1919, c. 18, 40 Stat. 1057, 1130). The indictment (R. 1–3) was in three counts. Each count charged a different sale of narcotics, on a different day, to a different person. Count 1 charged the sale of an unknown quantity of cocaine to one Charles Elmer, on January 4,

1923. Count 2 charged a similar sale of an unknown quantity of cocaine to F. H. Entriken on January 10, 1923. Count 3 charged a sale of morphine to B. Ellison on January 17, 1923. All three counts contained the proper allegations that the defendant was a person required to register under the Harrison Act, that he had not registered, and that he had not paid the special tax required by the Act.

To this indictment the defendant at first pleaded not guilty. (R. 3.) Subsequently, he changed his plea to one of *guilty* upon all three counts. (R. 4.) He then became a fugitive from justice; and on April 23, 1923, his recognizance was forfeited and a bench warrant was issued for his arrest. (R. 4.) On September 4, 1923, he was brought before the court and sentenced. The sentence (R. 5) recites the plea of guilty to the three counts of the indictment, and then proceeds:

> * * * whereupon, in accordance with said plea it is by the Court
>
> Considered and Adjudged that said defendant is guilty of the crime aforesaid, and that as punishment therefor said defendant be confined in the United States Penitentiary situated at Leavenworth, Kansas, *for the term of Five (5) years on each of said three counts* and until he shall have been discharged from said Penitentiary by due course of law. *Said term of imprisonment to run consecutively and Not concurrently.* (Italics ours.)

This was the maximum sentence provided by section 9 of the Harrison Act. On writ of error, the Circuit Court of Appeals (see 2 F. (2nd) 691) sustained the conviction, but held that the sentence must be taken to mean a term of five years only and not of fifteen, contrary to the clear intention of the Trial Judge. The Court said (2F. (2nd) 691, 692):

> Where sentences are imposed on verdicts of guilty, or pleas of guilty, on several counts or on several indictments consolidated for trial, it is the rule that the sentences so imposed run concurrently, in the absence of specific and definite provisions therein that they be made to run consecutively by specifying the order of sequence. If the order in which the terms of imprisonment for the different offenses is to be served, is not clearly designated, the terms are to be served concurrently, and the defendant can not be held in further confinement under the sentence after the expiration of the longest term imposed. Cumulative sentences are permissible, and in some cases are appropriate, but when imposed on different counts or indictments there must be certainty in the order of sequence.

Judgment was accordingly given that the defendant's sentence be treated as one for five years only. (R. 24.) A petition by the Government for rehearing was denied (R. 40) 4 F. (2nd) 344.

Subsequently, the Government petitioned this Court for a writ of certiorari, on the grounds that the question as to the sentence was of great public importance, that the decision of the Circuit Court of Appeals was contrary to the weight of Federal authority, and that, if allowed to stand, it would result in a very large jail delivery throughout the Eighth and other Circuits. In the supporting brief it was stated (p. 3):

> This petition presents but a single question, i. e., whether, in case sentences are imposed simultaneously on different indictments, or on different counts in the same indictment, the order of sequence in which such sentences are to be served must be stated by the court if they are to run consecutively and not concurrently.

On April 13, 1925, this Court granted the petition. 26 — U. S. —, 45 Sup. Ct. Rep. 508.

SPECIFICATION OF ERRORS TO BE URGED

The only error which will be urged is that just stated, namely, that the judgment of the Circuit Court of Appeals (R. 24) has resulted in an unwarranted alteration and misapplication of the original sentence imposed upon the defendant. The purpose of this proceeding is to restore the original judgment and sentence of the District Court, imposing three *consecutive* terms of five years each.

ARGUMENT

Summary

I. The District Court had authority in this case to impose cumulative or consecutive sentences.

II. The District Court clearly intended in this case to impose consecutive sentences totaling 15 years.

III. Prior decisions in this Court, as well as the weight of lower Federal authority, demonstrate the sufficiency of this sentence in point of form.

IV. Sound sense and a proper interpretation of the law require that the sentence in this case be given its natural meaning, according to the intention of the Trial Judge.

V. Even on the assumption that the sentence is defective in point of form, the defect is trivial, and should be disregarded.

I

The District Court had authority in this case to impose cumulative or consecutive sentences.

It is undisputed that the Federal Courts may, in proper cases, impose cumulative sentences. This proposition has been many times affirmed by this Court.

Badders v. *United States,* 240 U. S. 391.
Morgan v. *Devine,* 237 U. S. 632.
Carter v. *McClaughry,* 183 U. S. 365, 394.
In re De Bara, 179 U. S. 316.
Blitz v. *United States,* 153 U. S. 308, 317.
In re Mills, 135 U. S. 263.
In re Henry, 123 U. S. 372.

It is equally undisputed that the present case was a proper one for the imposition of such a

sentence. The three counts to which the defendant pleaded guilty charged *similar but separate offenses* committed on different days, and involving different sales of narcotic drugs. The defendant had obviously committed three distinct violations of the law; and he could obviously be punished separately for each.

Badders v. *United States,* 240 U. S. 391.
Ebeling v. *Morgan,* 237 U. S. 625.
Wallace v. *United States,* 243 Fed. 300, 310; certiorari denied, 245 U. S. 650.

Nor can this be deemed "cruel and unusual punishment," within the scope of the constitutional prohibition, as defined by this Court.

Badders v. *United States* (*supra*).
Howard v. *Fleming,* 191 U. S. 126, 136.
O'Neil v. *Vermont,* 144 U. S. 323, 331.
In re Kemmler, 136 U. S. 436.

II

The District Court clearly intended in this case to impose consecutive sentences totaling 15 years.

The language of the sentence in this case is clear. It expressly states (R. 5):

Said term of imprisonment to run consecutively and NOT concurrently.

Whether this language be inartificial or insufficient is a matter to be discussed later. But at the outset it can not be denied that the *intention* was clear. The Trial Judge had obviously no doubt

in his mind. The punishment which he *intended* to inflict was one of fifteen years, *not* one of five years. The language of the sentence can bear no other interpretation.

It can not be denied, moreover, that the Trial Judge in this case, as in all cases in the Federal Courts, had absolute discretion to fix sentence within the limits prescribed by law. The Federal appellate courts, unlike the Supreme Court of the Philippine Islands or the Court of Criminal Appeal in England, have no power whatever to revise or to alter sentences lawfully imposed. If the sentence pronounced by the Trial Judge falls within the limit prescribed by statute for the particular offense, it can be neither increased nor decreased by the appellate court. In this case the sentence of five years on each count was the maximum laid down by section 9 of the Harrison Act. (Act of Dec. 17, 1914, c. 1, 38 Stat. 785, 789.) Hence its infliction was fully within the power of the Trial Judge. A fine, indeed, might also have been inflicted, but was not.

It may properly be assumed, moreover, that the Trial Judge had before him ample evidence, *dehors* the record, to justify the imposition of the sentence. It is altogether reasonable to suppose that he possessed information, not available to this Court, concerning the defendant's character and antecedents and the circumstances of his crimes. The three distinct charges to which the defendant pleaded guilty were of themselves

sufficient to warrant the belief that he was an habitual offender, and that it would be misplaced leniency to treat him as a person guilty merely of a single isolated offense. In any event, however, the Trial Judge acted within the limits prescribed by law. His purpose as to the length of the sentence was manifest beyond all contradiction. And unless some lawful obstacle exists, that purpose must be carried into effect.

Bailey v. *United States,* 284 Fed. 126.
Wallace v. *United States,* 243 Fed. 300, 310.

III

Prior decisions in this Court, as well as the weight of lower Federal authority, demonstrate the sufficiency of this sentence in point of form.

It is the defendant's contention, however, that the intention of the Trial Judge can not be carried into effect, because it is insufficiently expressed. The sentence, he argues, is fatally defective because it fails to set forth at length the order in which the three five-year terms are to be served. The fact that it specifically states they are to be served "*consecutively and not concurrently,*" he declares, it not enough.

In *Morgan* v. *Devine,* 237 U. S. 632, this Court was confronted with an exactly similar situation. There the defendants, Devine and Pfeiffer, pleaded guilty to an indictment in two counts, which charged violation of two sections (192 and

190) of the Penal Code. The sentence of the District Court upon Devine, as shown by the Record used here on appeal (Record in No. 685, October Term, 1914, at page 14) ran thus:

> * * * And the district attorney moving for sentence, thereupon the court pronounced the following sentence, to wit: That said defendant, Alphonso J. Devine, alias Ollie Devine, be confined in the United States penitentiary at Leavenworth, Kansas, for the term of four years on the first count of said indictment, and on the second count of said indictment that he be confined in the United States penitentiary at Leavenworth, Kansas, for the period of two years, and that he pay the costs of prosecution, *said sentences to be cumulative, and not concurrent.*

The same language was used in imposing cumulative sentences of three and a half years and two years upon the other appellant, Pfeiffer. (Record in No. 685, October Term, 1914, at page 16.)

In that case the form of the sentences was not specifically assigned as ground for appeal, but it did not pass unnoticed in the Court. The opinion states (237 U. S. 632, 636):

> One [Devine] was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for four years on the first count and for two years on the second count of the indictment, *the sentence to be cumulative and not concurrent.* The other appellee [Pfeiffer] was likewise sen-

tenced for three and one-half years' imprisonment and a fine of $100 on the first count and two years on the second count.

From the above it seems clear that this Court regarded as beyond criticism the language there used. And in the present case the form of sentence was almost precisely the same.

The weight of lower Federal authority amply supports the contention of the Government, and is in full accord with *Morgan* v. *Devine*. This is especially true of the more modern decisions. At least two Circuit Courts of Appeals are ranged on the Government's side, as well as a number of the District Courts.

Neely v. *United States*, 2F. (2nd) 849, 852, C. C. A. 4th Circuit.

Blake v. *Moyer*, 208 Fed. 678, C. C. A. 5th Circuit. Same case in Dist. Ct., 206 Fed. 559.

Howard v. *Moyer*, 206 Fed. 555.

Ex parte Poole, 273 Fed. 623.

Ex parte Farlow, 272 Fed. 910.

Anderson v. *Moyer*, 193 Fed. 499.

And the Circuit Court of Appeals for the Eighth Circuit, in deciding the present case, ran directly counter to at least three of its own former decisions.

Brinkman v. *Morgan*, 253 Fed. 553; *Myers* v. *Morgan*, 224 Fed. 413; *Hyde* v. *United States*, 198 Fed. 610.

In *Brinkman* v. *Morgan, supra*, the petitioner had pleaded guilty to an indictment which

charged, in eight counts, eight separate forgeries of postal money orders, in violation of Section 218 of the Penal Code. He had received a single sentence of ten years' imprisonment, "to run concurrently on all counts of the indictment." The maximum sentence possible on any one count was five years. After serving five years he sought relief by habeas corpus. The Circuit Court of Appeals for the Eighth Circuit denied him relief, saying (253 Fed. 553, 554):

> We can conceive of no sound legal objection to a single sentence for several offenses charged in one indictment, if it does not exceed the statutory maximum for all. * * * It is true that the word "concurrently" is generally used where terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as "in combination or unity." When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate.

In *Myers* v. *Morgan, supra,* the petitioner had been convicted under two counts of an indictment, charging violation of the Mann Act. (Act

of June 25, 1910, c. 395, 36 Stat. 825.) He had been given a single sentence of ten years' imprisonment. The maximum possible on either count was five years. The Circuit Court of Appeals for the Eighth Circuit, in denying him relief on habeas corpus, stated (224 Fed. 413, 414):

> The record shows that the court had jurisdiction, and in our opinion the court did not act in excess of its jurisdiction in imposing a sentence of ten years in one judgment for two distinct offenses.

In *Myers* v. *Morgan,* the attention of the court was drawn to the contrary views of the Circuit Court of Appeals for the Third Circuit in *United States* v. *Peeke,* 153 Fed. 166. But the court expressly refused to follow that decision. 224 Fed. 413, 415.

In reliance upon these decisions and upon the decision in *Morgan* v. *Devine, supra,* the judges and clerks of Federal Courts in many districts have for many years framed cumulative and consecutive sentences and commitments in the form which the Circuit Court of Appeals has now declared to be insufficient. All of these sentences are liable to be overturned by the decision below in the present case. The effect of that decision has been most alarming.[1] As stated in the Government's petition for certiorari (p. 3):

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[1] On August 1[illegible], 1925, the United States Attorney for the District of Kansas reported:

"We have now pending approximately twenty petitions for writs of habeas corpus filed in reliance upon the Daugherty decision. Some

If the decision of the Circuit Court of Appeals is permitted to stand, it will result in a very large jail delivery throughout the Eighth Circuit and in other circuits. The sentences of many prisoners now in confinement have been framed in substantially the same way as the sentence in this case, and already a large number of petitions have been filed for writs of habeas corpus to release such prisoners from the confinement manifestly intended by the respective District Courts.

IV

Sound sense and a proper interpretation of the law require that the sentence in this case be given its natural meaning, according to the intention of the Trial Judge.

Cases have been cited above in support of the form of sentence here employed. Altogether apart, however, from these authorities, the Government's contention finds support alike in reason and in law. This Court has many times declared that words are to be given their natural meaning, dependent upon the circumstances in which they are spoken. They are to be neither disregarded altogether nor distorted into an alien significance.

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have already been released under this decision and every few days there are more being filed.

"I am informed by the Warden that sixty-four prisoners now in Leavenworth appear to be serving sentences of the same type as the Daugherty sentence."

Reports received at the same time indicate that there are 39 prisoners serving sentences of a similar type in Atlanta Penitentiary. Several instances have also been reported of such sentences where the prisoners have been committed to local jails, but information is not available as to the total number.

Towne v. *Eisner,* 245 U. S. 418, 425.
Lamar v. *United States,* 240 U. S. 60, 65.
Swift & Co. v. *United States,* 196 U. S. 375.

In this case, unfortunately, the Circuit Court of Appeals has adopted a different rule. It has found no difficulty in interpreting the Trial Judge's words "consecutively *and not* concurrently" as meaning their exact opposite—"concurrently *and not* consecutively"—or as meaning nothing at all. This interpretation is altogether out of accord alike with law and reason. Admittedly, the Trial Judge might have said in this case:

> I sentence you to five years' imprisonment upon the first count. And upon the expiration of that term I sentence you to five years' imprisonment upon the second count. And upon the expiration of that term I sentence you to five years' imprisonment upon the third count.
>
> Cf. *Neely* v. *United States,* 2 F. (2nd) 849, 853.

And the defendant would then have received a valid sentence for a total of fifteen years. As it is, he received exactly the same sentence in a different form of words. He can not now claim a cancellation of two-thirds of his sentence because the Judge used eight words to signify his purpose where he might have used fifty.

But it may be argued that the sentence must specify the order in which the terms are to be served, in order that the defendant and the War-

den may know at any given moment upon what count the custody is based, or in order that no uncertainty may arise in case one of the counts should be quashed, or in case a pardon should be granted upon one of them. This reasoning appealed to Mr. Justice Bradley in *United States* v. *Patterson,* 29 Fed. 775; and apparently it carried great weight with the Circuit Court of Appeals in the present case. But it is submitted that such reasoning has in fact no weight at all. The indictment in this case had three counts, consecutively numbered, One, Two, and Three. What did the Trial Judge intend when, referring to this indictment, he ordered the sentences to run "*consecutively*"? Could he have intended anything save that they should run in the same order as the counts of the indictment, commencing with imprisonment on Count One? If he had intended, for some occult reason, that the defendant should serve his terms in reverse order, beginning with Count Three, or in mixed order, beginning with Count Two, would he not have said so?

This is not a mere inference or speculation used to fill gaps in an inadequate record. It is but a natural presumption arising from the regularity of judicial acts and from the use of words in their common meaning. It is akin to the presumption that, where some counts of an indictment are bad, the sentence is to be attributed to the good counts.

Abrams v. *United States,* 250 U. S. 616, 619.

Claassen v. *United States,* 142 U. S. 140. 147.

Common reason will here attribute the first five-year term to the first count of the indictment, the second five-year term to the second count, and the third to the third count. Any other interpretation would rob the word "*consecutively*" of all meaning. Both the defendant and the Warden will be able to know at any moment on which count the custody is based. And if a pardon or commutation should be granted on one count, its effect could be readily ascertained. If for any reason the custody upon the second count should be held invalid, this would not affect either the first or the third counts. The total term of imprisonment would merely be reduced from fifteen to ten years, and the defendant would commence to serve his time upon Count Three immediately upon the expiration of his term on Count One.

Blitz v. *United States,* 153 U. S. 308, 317.
Kite v. *Commonwealth,* 11 Metc. (Mass.) 581, 585.

All the objections raised to the sentence in this case apply with far greater force to the single sentence in gross (exceeding that which is possible on any count) "to run concurrently upon all counts." Yet this latter form of sentence has repeatedly been approved by the Courts, including the Court from which comes the present case.

In re De Bara, 179 U. S. 316.
Brinkman v. *Morgan*, 253 Fed. 553.
Myers v. *Morgan*, 224 Fed. 413.
And cases cited, *supra*, p. 11.

V

Even on the assumption that the sentence is defective in point of form, the defect is trivial, and should be disregarded.

Even if it be conceded that the form of this sentence is open to criticism, still it can only be criticized for its lack of verbosity, or, at most, for its infelicity of expression. Its intent is clear beyond doubt. That intent should prevail. There is no reason why it should be frustrated. The criminal law has progressed beyond the senseless barbarities of the seventeenth century. Appellate courts no longer need revert, *in favorem vitae*, to seventeenth century standards of interpretation. No longer need they apply the beneficent formalism of Sir Matthew Hale[2] or Lord Holt,[3] in order to prevent the enforcement of a code containing

[2] "If there be a proper *Latin* word for any offense or thing contained in an indictment, it may not be supplied with general words and an *Anglicé*.

Therefore an indictment, *quod exercuit quasdam diabolicas artes, Anglicé*, witchcraft, was quashed, because there is a proper *Latin* word for it, *viz. Incantatio*." 2 Pleas of the Crown, 169.

The stroke laid *in sinistro bracio*, where it ought to be *brachio*, vitiates an indictment for murder. Ibid. 170.

[3] *R.* v. *Walcot*, 2 Salk. 632:

"Writ of error to reverse a judgment against the defendant in an indictment of high treason; the judgment was, *quod interiora extra ventrem trahentur*; but these words, *in conspectu ejus et ipso vivente comburentur*, were omitted; it was agreed, that if this be a necessary

two hundred capital felonies. *State* v. *Felch*, 58 N. H. 1, 2; *Garland* v. *Washington*, 232 U. S. 642, 646.

Two hundred and fifty years ago, in fact, Sir Matthew Hale himself declared (2 Pleas of the Crown, 193):

> That in favor of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonour of God. And it were very fit that by some law this over grown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal without some timely remedy.

His observations on the over-technical interpretation of indictments apply with equal force to the over-technical interpretation of judgments and

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part of the judgment and omitted, the judgment is erroneous. * * * * * * And after the case had been argued several times at the Bar, upon the matter in law, the Court, Trin. 8 W. 3., unanimously, upon solemn arguments, reversed the attainder, for want of the words *ipso vivente, or in conspectu ejus*."

Cf. *R.* v. *Tucker*, Comberbach 257; *R.* v. *Alway and Dixon*, 1 Ventr. 171.

sentences lawfully pronounced. And it is respectfully submitted that his warning has not been unheeded. If Section 1025 of the Revised Statutes and Section 269 of the Judicial Code (as amended by the Act of Feb. 26, 1919, c. 48, 40 Stat. 1181) mean anything, they mean the abandonment of the outworn standards of interpretation which he condemned. This Court has given no support to the exaltation of form above substance, in criminal procedure or elsewhere. Judgments of Courts, lawfully given, are not to be overturned by trivialities.

Horning v. *District of Columbia,* 254 U. S. 135.

Garland v. *Washington,* 232 U. S. 642, 646.

Breese v. *United States,* 226 U. S. 1.

Swift & Co. v. *United States,* 196 U. S. 375.

Frisbie v. *United States,* 157 U. S. 160.

This case affords but another opportunity of applying the broad principles laid down in the cases just cited, and of reaffirming the decision in *Morgan* v. *Devine* (*supra,* pp. 9–11). In the light alike of modern precedents and of sound sense, no other course is possible.

CONCLUSION

It is therefore respectfully submitted that the Circuit Court of Appeals fell into grave error and acted beyond its proper authority when it en-

grafted upon the record an interpretation which its words will not bear, and when it thereby altered the effect of the sentence imposed by the District Court.

The judgment of the Circuit Court of Appeals (R. 24), in so far as it alters the sentence, should be reversed. The judgment of the District Court, imposing a sentence of three consecutive terms of five years each, or fifteen years in all, should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

AUGUST, 1925.

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No. 303.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

UNITED STATES OF AMERICA, PETITIONER,

VS.

JAMES DAUGHERTY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF THE RESPONDENT.

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No. 303.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

UNITED STATES OF AMERICA, PETITIONER,

VS.

JAMES DAUGHERTY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF THE RESPONDENT.

Previous Opinions in the Present Case.

The opinions of the Circuit Court of Appeals are reported in 2 F. (2nd) 691 and (on rehearing) 4 F. (2nd) 344.

The order of this court granting the writ of certiorari is reported in 26 U. S. ...., 45 Sup. Ct. Rep. 508.

Grounds of Jurisdiction.

The authority of this court to grant certiorari in a criminal case at the suit of the Government is not disputed.

ARGUMENT.

Summary.

I.

The sentence of the District Court in this case was for a term of five years only and not for fifteen years, because the sequence in which the three five-year terms were to be served was not stated.

II.

The District Court in this case had no power, authority or jurisdiction to impose consecutive or cumumulative sentences:

A. Because there is no United States Statute authorizing such sentences.

B. Because Federal judges prior to the last Session of Congress had no power to suspend or postpone the operation of a sentence for a definite or indefinite period of time for any cause, and can impose only one sentence within the maximum provided by the statute under which indictment is drawn.

C. Because the indictment in this case charged but one offense, namely, that the defendant failed to register on or before July 1, 1922, and pay the tax for the one fiscal year.

D. Because for the indictment in this case to charge more than one separate and distinct felony would be in violation of the Fifth Amendment to the Constitution of the United States.

I.

THE SENTENCE OF THE DISTRICT COURT IN THIS CASE WAS FOR A TERM OF FIVE YEARS ONLY AND NOT FOR FIFTEEN YEARS, BECAUSE THE SEQUENCE IN WHICH THE THREE FIVE-YEAR TERMS WERE TO BE SERVED WAS NOT STATED.

The respondent is not willing to admit that United States courts have any power or authority whatever to impose cumulative or consecutive sentences; but if it should be decided that they have such power in the absence of express statutory authority, then the uniform and firmly established rule of a majority of the courts throughout the whole country, both Federal and state, must be recognized, viz: that when a trial court imposes sentences on several indictments or several counts in one indictment, such sentence must state in positive and unambiguous language the sequence in which the terms of imprisonment so imposed are to be served, *i. e.*, the imprisonment on one, to be named, shall begin when imprisonment on the other, to be named, expires. Otherwise, all of the terms imposed will run concurrently. The addition of the words "to run consecutively" or "successively" or "not concurrently" can have no effect on the sentence. This is not without good reason and sound sense and not "*over technical interpretation of judgments and sentences.*"

No better argument can be here advanced than the *per curiam* opinion of Judges Sanborn, Lewis and Faris, on the motion for rehearing in the Circuit Court of Appeals in this case:

"We think it a sound principle and the authorities so hold that a convict will be discharged wherever the sentence and judgment of imprisonment for two offenses, whether charged in separate indictments or in separate counts of one indictment; does not expressly provide that the imprisonment on one, to be named, shall begin when the imprisonment on the other, to be named, expires. *The inquiry in all such cases is not what the court may have intended by the sentence and judgment, but rather what the sentence and judgment itself expressly says* (italics ours). The mittimus recites the sentence. It alone advises the keeper of the jail or penitentiary for what term or terms and for what length of time he may lawfully detain the convict and for that purpose he cannot rely upon what he may think the court intended in that respect. His authority for detention is the writ of commitment; its terms, taken from the sentence and judgment, must be definite and certain as to the period and length of time during which he can hold the convict in custody and if not definite and certain, the detention is unlawful. *He cannot indulge in surmise or apply rules of construction in attempts to determine what in his judgment the sentence may mean as to the time of imprisonment*" (italics ours).

The jailer and the prisoner, as well as others, have a right to know what sentence a prisoner is serving and when each sentence will begin to operate and expire. There are so many rights that may depend on the knowing when and how a given sentence shall run that we here need to enumerate but a few.

There might arise an occasion for the executive to pardon or commute a special sentence for any reason that would justify such action and he is certainly entitled to know whether the prisoner is at a given time serving such sentence or serving another sentence.

A judge or prosecutor might learn that fraud had been practiced upon the court in procuring a conviction on a certain count or certain indictment and desire to correct the sentence. Is he not entitled to know when such sentence is being served or if the discovery is not made until the particular sentence has been fully served, is not this vital to the true administration of justice? If the people under their right to petition, desired to petition the President for a pardon on a particular indictment, should not the jailer, the court or the Department of Justice be able to issue a record of the judgment and sentence without guesswork as to when the particular sentence was served or was to be served. If a clerk were required to certify to the docket entries of a particular indictment, should he be forced to make oath as to its correctness based on guesswork because the sentencing court failed properly to sentence the accused? And when testifying under oath as to previous convictions should there be any doubt as to when and where a certain sentence was served? Suppose there should be a reversal on one of the indictments or counts.

It is further submitted that the learned opinions of the judges of the Eighth Circuit are based both on logic and law and no better reasoning can be found than expressed in the original opinion and the opinion on the motion for rehearing, adding thereto the opinion of Mr. Justice Bradley of this court in the Patterson case, *infra*, sitting in chambers, and other recent cases, both state and Federal.

It is argued that it makes no difference which five year sentence respondent is serving, as five years is five years, but suppose respondent had a sentence of five

years on one count, three years on another count, and one year and a half on another count. Could it then be argued that it made no difference?

U. S. v. *Patterson*, (C. C.) 29 F. 775.
Puccinnelli v. *U. S.*, 5 Fed. (2nd) 6.
Haussener v. *U. S.*, 4 Fed. (2nd) 884.
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16 Corpus Juris, 1306.
In re: *Jackson*, 3 McArth, 34.
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Johnson v. *People*, 83 Ill. 431.
8 R. C. L. p. 242, Secs. 242-5.
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Larney v. *Cleveland*, 34 Ohio St. 599.
In re: *Strickler*, 51 Kan. 700, 33 Pac. 620.
Gordon v. *Wolfe*, 6 Philippine, 76.

If it is not a sound principle and not sound reasoning and not logical that the sequence should be stated, why have so many states enacted statutes empowering their courts to impose cumulative or consecutive sentences, admitting thereby that those courts had no such power prior to the enactment of such statutes? Which statutes specify how sentences shall be served.

Arkansas (Digest of Statutes, 1921, Sec. 3239, p. 949).

California Penal Code, Sec. 669, p. 420.

Georgia, Parks Annotated Code, 1914, Sec. 1067; provides sentence to commence at expiration of previous sentence. A judge must specify.

Iowa, Code, 1897, Sec. 5439. Judge may impose the sentences in any order he pleases.

General Statutes Kansas, 1915, Sec. 8170, p. 1617.

General Laws Mass., 1921, Vol. 2, Chap. 279, Sec. 8. Provides order of service of sentences shall be named in mittimuses.

Missouri, R. S. 1919, Sec. 3697.

North Dakota Compiled Laws, 1913, Sec. 10344. Provides sentences must be specified to commence at termination of first or subsequent terms.

Oregon Laws, 1920, Sec. 1576. Provides sentences may commence at expiration of any one, previous.

Texas Statute, 1919, Crim. Proc. 865E. Second sentences and subsequent sentences to commence at expiration of previous sentence or run concurrently in discretion of judge.

Washington Code, Pierce, 1919, Sec. 8720. Provides subsequent sentences shall commence at expiration of previous.

Code of Virginia, 1919, Sec. 4786. Provides subsequent sentences shall commence at previous term's expiration.

Even Military Courts think it highly important that the sequence in which a number of sentences imposed shall be served must be stated for we find it expressly provided in Manual for Courts Martial, Section III, 401, Par. B, United States Army:

> "When soldiers or other persons subject to military law, * * * while awaiting the result of a trial that terminates in a sentence of confinement, * * * are tried for a further offense and sentenced to confinement, * * * the period of confinement imposed by the second sentence will be executed upon the expiration of the period of confinement imposed by the first sentence. * * *"

In 16 Corpus Juris, Sec. 3082, p. 1306, it is stated:

> "In those jurisdictions where cumulative sentences are permissible, a judgment on a conviction of two or more offenses, involving imprisonment for two or more terms in succession, should not fix the date on which each term shall begin, but should direct it to commence at the expiration of the term prior thereto, which may be shortened by good conduct or otherwise. * * * If the court desires to have imprisonment under one sentence commence on the expiration of another, the sentence must so state, or else the two terms of imprisonment will run concurrently."

In the case of *The People* v. *Elliott, supra,* defendant was sentenced to serve ten days on each of the first

seventy counts and twenty days on the seventy-first count, *to run consecutively.* The court said:

> "The provision that the sentences shall run *consecutively* is equivalent to providing that they shall run *successively,* but the rule heretofore stated is, that it shall be *expressly stated in the sentence,* that one shall begin at the expiration of the previous one. * * * As there was no error except in the imposition of the sentence, the cause should be remanded for proper sentence" (citing seven cases) (italics ours).

In the case of *Haussener* v. *U. S., supra,* decided by the Circuit Court of Appeals for the ~~Ninth~~ Eighth Circuit, this summer, the court said:

> "In the case of Sellers, the sentences were for six months' imprisonment in jail on each of the three counts, said sentences of imprisonment *to run consecutively.* It will be noted, therefore, that the infirmity which this court pointed out in a similar sentence * * * inheres in the sentence pronounced in the case at bar. We construe the sentence here, therefore, to be for imprisonment in jail for a term of six months only" (Italics ours).

In the case of *In re: Wernsen, supra,* which is a Kansas case where there is a statute regarding consecutive sentences, it was held that successive terms of imprisonment run concurrently unless otherwise expressly stated and again in the same state, *In re Weisman, supra,* it was held that if it is not stated that the second sentence shall commence at the termination of the first one imposed they run concurrently.

In the case of *In re: Walsh, supra,* it was held that successive sentences should state that each should begin

at the termination of the previous one named, the reason stated being that the prior term may be shortened for good behavior by executive clemency or by reversal of the judgment.

District, Judge Sibley of the Northern District of Georgia *In re Chatterton, Petitioner H. C. No.* 66, October 1, 1923, said in discharging the prisoner:

> "It further appearing to the court that said sentence of four years on each of the four counts respectively does not specify that said sentences were to run consecutively instead of concurrently; that it is equivalent to a sentence of four years" (not officially reported).

This Honorable Court evidently thought something of the sacredness of the rights of an accused and the "regularity of judicial acts" when in *Crain* v. *United States,* 162 U. S. 625, it said, through Mr. Justice Harlan:

> "The record shall be a permanent memorial of what was the issue tried, and show whether the judgment whereby it was proposed to take the life of the accused or to deprive him of his liberty was in accordance with the law of the land. * * * *Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecutions for infamous crimes.* Even if there were a wide divergence among the authorities upon this subject, *safety lies in adhering to established codes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the record of cases involving the life or liberty of an accused are often prepared. Before a court of*

last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear affirmatively from the record that every step necessary to the validity of the sentence has been taken" (italics ours).

The above case, as to the necessity of a plea, was overruled in *Garland* v. *Washington*, 232 U. S. 642.

All of the argument here advanced by counsel for petitioner was presented to the court below, injecting without justification or excuse matter wholly extraneous to the record that could not possibly affect a simple rule of law in an effort to save that court the embarrassment of *"falling into grave error."* It may be true that Appellate Courts need no longer revert *"in favorem vitae* to seventeenth century standards of interpretation," but it is equally true that when a hue and cry of a great "exodus from penitentiaries" and "jail delivery," is raised *in terrorem populi* for want of authorities to support a contention, Appellate Courts need not become stampeded and disregard the settled principles of strict interpretation *in favorem libertatis.* Petitioner's argument is equivalent to asking this Court to declare a law constitutional, which is not, because it would turn great numbers out of penitentiaries, to hold otherwise.

There has been no noticeable exodus from the penitentiaries throughout the United States, although this has been the uniform rule of law regarding sentences since the beginning of our Republic.

The doors of penitentiaries swing in with much more ease than they do in the reverse direction.

The only answer that can be made to foot note 1, on page 13 of petitioner's brief is to say (if we may also be permitted to wander afield) that all of the petitions for writs referred to were dismissed by the District Court of Kansas, with the exception of the Hodges case, *supra*, and that was not decided upon the strength of the Daugherty decision as the opinion will show, but upon the uniform rule of law. It will have to be admitted, therefore, that one great "exodus" has received somewhat of a setback.

The counsel for petitioner complain because the learned Judges of the Eighth Circuit noticed error unassigned (which was admittedly their privilege; *August* v. *U. S.*, [C. C. A.] 257 Fed. 388), yet in another breath ask this court to rely on the case of *Morgan* v. *Devine, infra*, in which case such error was not only unassigned on appeal but was merely mentioned by Mr. Justice Day *in stating the facts*. It certainly could not be argued that *Morgan* v. *Devine* should be considered authority for reversing the learned Judges of the Eighth Circuit in the case at bar.

Section 1025 Revised Statutes referred to on page 20 of petitioner's brief covers only defects and imperfections in the form of indictments and proceedings affected by such defects and imperfections of form only. It does not apply to judgments, sentences and commitments that are *bad in substance*.

Section 269 of the Judicial Code also therein referred to, gives the appellate courts power to *notice error not assigned*, and to disregard errors or defects which do not affect the *substantial rights of the parties*.

The sentence in this case certainly affects the substantial rights of the respondent, James Daugherty, and the decision of the Court of Appeals was not "*the exaltation of form over substance.*"

We will now consider and discuss the cases cited in petitioner's brief in the order in which they appear and distinguish them from the case at bar.

Badders v. *United States,* (Pet. Br. 6).

The statute under which that prosecution was had made each deposit of a letter in a mail box with intent to defraud a separate offense and has no application to the case at bar.

Morgan v. *Devine,* (Pet. Br. 6).

The indictment was in two counts charged under separate statutes. The question of cumulative or consecutive sentences was not passed on or even referred to *obiter dictum.*

Carter v. *McClaughry,* (Pet. Br. 6).

Nothing is said in this case regarding cumulative or successive sentences and again two crimes are charged under separate statutes.

In re: *De Bara,* (Pet. Br. 6).

Holds that there must be a single sentence under several indictments.

Blitz v. *United States,* (Pet. Br. 6).

Holds that when a prisoner is sentenced on the first and third counts of an indictment, imprisonment on the third shall be made to commence on the expiration of

the first count and in this respect supports the contention of the respondent.

In re Mills, (Pet. Br. 6).

A close examination fails to disclose any ruling in this case concerning cumulative or consecutive sentences.

In re Henry, (Pet. Br. 6).

There is no ruling concerning cumulative or successive sentences.

Ebeling v. *Morgan,* (Pet. Br. 7).

This case is discussed under another point in respondent's brief.

There is no contention that the sentence imposed upon respondent was "cruel and unusual punishment" as set out in petitioner's brief, page 7.

Neely v. *United States,* cited on page 11 of petitioner's brief, can really be considered as supporting respondent's contention for it holds that a general sentence may be imposed but the better practice is to sentence separately on each count, further stating that the *proper method of sentencing* on several counts is to state that the sentence on the second count shall commence at the expiration of the first sentence and the sentence on the third count shall commence at the expiration of the second sentence.

Blake v. *Moyer* and *Howard* v. *Moyer,* (Pet. Br. 11) discussed the proposition of a gross sentence and the defendants in both cases were charged with separate crimes of breaking and entering different Post Offices and neither of the cases is analogous to the one at bar.

Ex parte Poole, (Pet. Br. 11).

Defendant was sentenced in gross for three crimes made separate by statute and in no way measures up to the case at bar. There is no question in the case concerning cumulative sentences.

Ex parte Farlow, (Pet. Br. 11).

Defendant received a gross sentence for separate crimes, made so by statute and here there was no decision on the question of cumulative sentences.

Anderson v. *Moyer,* (Pet. Br. 11).

We have here what the court attempted to make a gross sentence of ten years but in reality under the uniform rule of law was but a sentence of five years, (if Federal Courts have power to assess cumulative sentences) because it was not stated how the last two sentences of two and one-half years each were to be served. If a writ of habeas corpus had been applied for on that ground no court following uniform rule of law would have failed to discharge the prisoner (see *In re Hodges, supra*).

Brinkman v. *Morgan,* (Pet. Br. 11).

This case also presents a gross sentence for separate crimes of forgery with no application to the case at bar and nowhere, comparing the case at bar, has the Eighth Circuit "run directly counter to its former decisions." It is not a parallel case *in omnibus.*

Myers v. *Morgan,* (Pet. Br. 11).

This, too, is a case where defendant was convicted of two separate and distinct violations of the Mann Act and a gross sentence imposed. A close examination of

this case will not disclose where the Eighth Circuit "has run directly counter to its former decisions." It can in no way be considered as resembling the case at bar.

Hyde v. *United States,* (Pet. Br. 11).

This is another gross sentence case under the same law as the Badders case, *supra,* and again we must contend that there is nothing in the opinion to indicate that the court ran counter to its former opinions in deciding the case at bar.

Therefore, after a thorough examination of the cases cited by the Petitioner in support of its contention that the learned Judges of the Eighth Circuit "fell into grave error" and acted beyond their proper authority when they held that the respondent should serve five years instead of fifteen years under the sentence imposed by the District Court, we have failed to discover any ruling that would overturn the general and uniform rule of law regarding cumulative and consecutive sentences, which that court adhered to.

II.

THE DISTRICT COURT IN THIS CASE HAD NO POWER, AUTHORITY OR JURISDICTION TO IMPOSE CONSECUTIVE OR CUMULATIVE SENTENCES:

A. Because there is no United States Statute authorizing such sentences.

It will be noted that Counsel for Petitioner have stated in their brief on page six that "the District Court had authority in this case to impose cumulative or consecutive sentences." This statement we challenge and make answer with a question: Where is the statute giving to United States Courts power, authority or jurisdiction to impose cumulative or consecutive sentences? Such statutory authority is most conspicuous by its absence.

There was some doubt in the mind of Mr. Justice Bradley in Patterson case, *supra,* as to whether or not United States Courts had such authority in the absence of a statute, but he was not called upon to decide that question. His words evinced such doubt, where in his opinion it is said:

> "*Perhaps* these terms might have been lawfully made to take effect successively, *if the order of the succession had been specified, although there is no United States statute authorizing it to be done.*" (Ital. ours.)

It has been held in a number of states that in the absence of statutes, courts have no power to impose cumulative or consecutive sentences.

Miller v. *Allen*, 11 Ind. 389.
Kennedy v. *Howard*, 74 Ind. 87.
Jones v. *Ward*, 2 Met. (Ken.) 271.
In re Bloom, 53 Mich. 597; 19 N. W. 200.
Ex parte Myers, 44 Mo. 279.
Prince v. *State*, 44 Tex. 480.
Ex parte McGuire, (135 Cal. 339-43; 67 Pac. 327).
Ex parte Morton, 132 Cal. 346; 164 Pac. 469.
Ex parte Casey, 160 Cal. 357; 116 Pac. 1104.
7 L. R. A. (N. S.) 124.

In the California cases above cited, it was held that the power of courts of that state to impose cumulative or consecutive sentences was limited to two classes of cases set out in the Code and there was an absence of such power as to all other cases.

As the authority of Federal Courts is derived from Congress and Congress has never given power or authority to such courts to impose cumulative or consecutive sentences, we must conclude that they have no such power.

B. Because Federal Judges prior to the last Session of Congress had no power to suspend or postpone the operation of a sentence for a definite or indefinite period of time for any cause and can impose only one sentence within the maximum provided by the Statute under which indictment is drawn.

It cannot be argued that Section 1024, Revised Statutes authorizes Federal Judges to impose several sen-

tences and then suspend one until the other has been served, because until changed by the last Congress (Act Approved Mar. 4, 1925, Pub. 596, Min. Bill 1042, Sec. 10564 4/5, Vol. 1, No. 8, Comp. Stat. 1925), it has been well settled law that Federal Judges have no power to suspend a sentence once imposed for a definite or indefinite period and certainly where three five-year sentences are imposed one on each of the three counts of an indictment and the court orders that the second and third sentences shall be held in abeyance (suspended) until the first is fully served, he has suspended operation of the said last two sentences and this Court has held that a Federal judge could not suspend a sentence even to place a person on probation. Ex Parte 4 U.S. 242 4 U.S. 27

The proper method of sentencing a person convicted on an indictment containing more than one count is but one gross sentence for the entire *indictment*. Splitting up of sentences is not sanctioned by well considered cases.

Ex parte Henry, 123 U. S. 372.
In re DeBara, 179 U. S. 316.
Gillispie v. *Walker*, 296 Fed. 330.
People ex rel. v. *Liscomb*, 60 N. Y. 559.
People v. *Felker*, 61 Mich. 110.
Edgerton v. *Commonwealth*, 5 Allen (Mass.) 514.
United States v. *Peeke*, 153 Fed. 166, 82 C. C. A. 340.

In the Henry case, *supra*, Mr. Chief Justice Waite said:

"Under the present statute three separate offenses committed in the same six months may be

joined * * * and when joined there is to be a single sentence for all."

In the De Bara case, *supra*, it was held that the court below had the power to sentence for the several offenses but there could be but one sentence. The respondent does not fully agree with that part of the opinion in this case that the sentence could be in excess of the statute.

In *People* v. *Felker, supra*, the court said:

> "The proceedings in this case cannot be sanctioned, a judgment in a criminal case cannot be divided up and parceled out and pronounced from time to time by the court * * * the judgment last pronounced in this case is not a correction or alteration of the determination of the court, when it pronounced the first judgment. It is a sound judgment * * * there is neither law nor precedent for such course as was pursued in this case, and the judgment given must be reversed and respondent discharged."

In *Edgerton* v. *Commonwealth, supra*, the Supreme Court of Massachusetts said,

> "It is well settled that several distinct offenses, committed at different times, may be alleged and charged in as many different counts in the indictment, if they are of the same degree and are subject to the same kind of penalty or punishment, the whole of which for which offenses may be imposed in one sentence, awarded upon a judgment rendered upon a general conviction of the accused of all the offenses which are thus alleged and charged against him. 1 Chit. Crim. Law, 253. Arch. Crim., p. 60. Upon such an indictment the same plea of not guilty raises an issue upon each

and every one of the several counts and the defendant may therefore be convicted upon one or more than one, or upon all of them, *but there can be only one judgment upon the indictment and this must be strictly and exclusively upon the particular count or counts upon which the defendant has been found guilty.* It is a necessary consequence from this principle that the judgment rendered and the sentence awarded in pursuance thereof definitely and conclusively dispose of the whole indictment." (Italics ours.)

In another Massachusetts case, *Commonwealth* v. *Foster,* 122 Mass. 317, Chief Justice Gray, later of this court said:

"In *Edgerton* v. *Commonwealth,* this court was of the opinion that there could be only one judgment upon the indictment and that consequently a judgment and sentence upon one count definitely and conclusively disposed of the whole indictment and operated as an acquittal upon or discontinuance of the other counts and the same view has been affirmed by decisions in other states."

Guenther v. *People,* 24 N. Y. 100.
Girts v. *Commonwealth,* 22 Post. 351.
Winzorphlin v. *State,* 7 Black. 186.
Stoltz v. *People,* 4 Scam. 168.
State v. *Hill,* 30 Wisc. 416.
Kirk v. *Commonwealth,* 9 Leigh, 627.
Nabors v. *State,* 6 Ala. 200.
Morris v. *State,* 8 S. M. & Marsh, 762.
State v. *Addy,* 43 N. J. L. 113.
Brown v. *Rice,* 57 Me. 55.
Tuttle v. *Long,* 100 Me. 123.
State v. *Hackett,* 129 Mo. App. 639.
In re: *Beck,* 63 Kan. 61.
In re: *Webb,* 89 Wisc. 354.
State v. *Hood,* 51 Me. 363.

Supported by this array of authority, it is respectfully submitted that the trial court had no jurisdiction to sentence the respondent James Daugherty to three separate terms as it attempted to do but the court should have assessed one single sentence and that within the statute—or a sentence on one or all of the said three counts of the indictment of not exceeding five years. When the trial judge assessed the first sentence of five years his jurisdiction was exhausted and the last two five-year sentences were void for want of jurisdiction.

U. S. v. *O'Callahan*, (1855) 6 McLean (U. S.) 506.
In re: *Walsh*, 37 Nebr. 457.
State v. *Hood*, 51 Me. 363.
Ex parte Lange, 18 Wall; 85 U. S. 163.
Gillispie v. *Walker*, 296 Fed. 330.
Mich. Trust Co. v. *Ferry*, 175 Fed. 667.
Halligan v. *Wayne*, 179 Fed. 112.
Munsen v. *McClaughry*, 198 Fed. 72.

In *Ex parte Lange, supra*, Mr. Justice Miller said:

> "What avail is the Constitution's protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that having once been tried and found guilty, he can never be tried again for the same offense? Manifestly it is not the danger of jeopardy of a second time being found guilty. It is the punishment that would legally follow the second conviction, which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction and the sentence of the judgment executed on the criminal, he can be again sentenced on that conviction to another or different, or to endure the same punishment a second time, is the constitutional restriction

> of any value? *Is not its intent and its spirit in such a case as much violated as if a new trial had been had on a second conviction and a second punishment inflicted?* (Italics ours.) The argument seems to us to be here irresistible and we do not doubt that the Constitution was designated to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

In *People ex rel. Tweed* v. *Liscomb, supra,* it was held where several offenses of the same grade or character were joined in one indictment and tried jointly and sentence was given on one count, that the power and jurisdiction of the court was exhausted by such first sentence and that other sentences attempted to be assessed were *coram non judice* and void.

It is respectfully submitted that all cumulative and consecutive sentences assessed by Federal Courts prior to the last session of Congress are illegal and void because there was no law of the United States authorizing a suspension of sentences and that all sentences passed upon the prisoner commenced to run either from the date of sentence or from the date of the arrival of the prisoner at the designated penitentiary, and all such sentences will be concurrent as at common law. For Congress has not changed the common law rule, by a clear and definite statute, and this Honorable Court is asked without further argument to consider and hold that the only valid part of a multiplicity of sentences imposed prior to the last session of Congress is the first sentence passed and that when the Federal Court passed its first sentence under the indictment in this case containing a number of counts, it exhausted its jurisdiction

and every attempt to pass additional sentences was *coram non judice.*

The court should impose but one sentence and not divide up and dole out its sentences in fractions.

In re: *Henry, supra.*
In re: *De Bara, supra.*
In re: *People ex rel. Liscomb, supra.*
Gillespie v. *Walker, supra.*
Ex parte Lange, supra.
Church on Habeas Corpus, par. 3563.

C. Because the indictment in this case charged but one offense, namely, that the defendant failed to register on or before July 1, 1922, and pay the tax for the one fiscal year (R. pp. 1, 2, 3).

The Harrison Anti-Narcotic Law is purely a revenue measure and the sharp division of this Honorable Court in

Jin Fuey Moy v. *U. S.*, 241 U. S. 394,
United States v. *Doremus*, 249 U. S. 86, and
Linder v. *U. S.*, 45 Sup. Ct. Rep. 446,

clearly indicates that this statute must be strictly construed and not extended beyond the proper limits of a revenue measure, and approaching the issue herein from that viewpoint, it must be admitted that as such the main purpose of the act is to raise revenue, and the moral end it may have in view can be reached only through treating it as a revenue measure. Let us first look at Section I of the Act of December 17, 1914, 38 Stat. 785, Comp. Statutes, 1918, Section 6287 G., as amended Sec. 1006, Federal Stat. Ann., 1919 which says in part:

"Section 1. That on or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business and place or places where such business is to be carried on, *and pay the special taxes hereinafter provided*" (italics ours).

It will be noted that this revenue act primarily requires a yearly registration and annual tax or license fee. This portion of the statute is the only door by which the Federal Government can enter for jurisdiction and the coating of constitutionality is so thin that an indictment drawn under this act must be worded so as to carry out the revenue idea and not show on its face that the taxing provision is merely a means to an end. The three alleged sales charged in this indictment are all made within eleven days of one another, within one month and within one fiscal year, and are but incidents or overt acts which show that the respondent was doing business. This business would have been perfectly legal if the respondent had done one thing, *i. e.*, registered and paid the annual tax from July 1, 1922 to June 30, 1923. It is therefore most apparent that the gravamen of the offense is the one failure to register and pay the one yearly tax and not the sales, and it must be admitted that if said tax had been paid, the respondent could not have been charged with any one of the three sales. Therefore, respondent can in law and in fact be guilty of but one violation of this law enacted only as a revenue

measure as the government suffered but one loss of revenue, to-wit, the yearly tax due July 1, 1922. This law is analogous to that in the English case of *Crepps* v. *Durden*, (K. P. Cowper) Pt. 2 P. 640—cited with approval by this court, in *Ex parte Snow, infra.*, Lord Mansfield delivered the opinion of the court, stating:

> "Here are three convictions of a baker for exercising his trade on one and the same day, he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to *levy but one penalty*, there is an end of the question; for there is no penalty at common law. On the construction of the Act of Parliament the offense is 'exercising his ordinary trade upon the Lord's day,' and that, without any fractions of a day, hours or minutes. It is but one entire offense, whether longer or shorter in point of duration. So, whether it consists of one or the number of particular acts, the penalty incurred for this offense is five shillings. There is no idea conveyed by the act itself that, if a tailor sews on the Lord's day, every stitch he takes is a separate offense; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day. And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day. Killing a single hare is an offense; but the killing of ten more on the same day will not multiply the offense or the penalty imposed by the statute for killing one. Here repeated offenses are not the object which the legislature had in view in making the statute, but singly, to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect to the three last convictions" (italics ours).

We gather from this that where a person was convicted for doing one act within a given time, that if the statute merely provided it shall be unlawful so to do, prosecution can be had but once, even though during the said time, be it an hour, a day or a year, many acts of the same forbidden class are completed.

If a statute provided that a broker could not sell or purchase stocks or bonds or engage in the business of stock broker without first obtaining an annual license and such person should fail to procure such license and would engage in such business, could he be prosecuted separately for each sale or business transaction consummated during the business year or would he be simply prosecuted once for the failure to procure a license and would not the separate transaction, sales, etc., be but overt acts, showing that he had actually engaged in said business without registering and paying the tax or license?

In the enactment by Congress of the Harrison Anti-Narcotic Law it is made unlawful to engage in the business of selling, distributing, dealing in narcotic drugs without first obtaining a permit or license, registering the style of the contemplated firm and paying a tax for the ensuing twelve months. Thus Congress has set forth a space of time, to-wit, one year, in which it will be unlawful to do one or more forbidden acts without first doing the only thing required by this revenue act, namely, registering and paying the tax or license for the fiscal year, and if during the said fiscal year in which the party was doing business without having procured the license (registered and paid the annual tax), he com-

mitted one act, he might be subject to prosecution but the prosecution could not be based on the sale but would be based solely on the failure to register and pay said annual tax, and a multiplicity of sales during said one year would not add to or detract from the real offense of failing to register and pay the one tax. We find this principle has been closely adhered to by this Court in many well considered cases.

In *Baltimore and Ohio S. W. R. R. Co.* v. *U. S.*, 220 U. S. 94, this court held that under the 28-hour law governing the shipment of animals, only one penalty could be recovered for shipments held over 28 hours, regardless of the number of animals held or the number of carloads of animals held.

In *Ex parte Snow*, 120 U. S. 274 (1887)—this Court held that where an act stated that it would be unlawful for a man to cohabit with more than one woman and his wife, and a prosecution was had for cohabiting with a woman over a given time, that a second prosecution for co-habiting or adultery with the same woman could not be sustained if said acts were committed before the finding of the first indictment and were parts of a continuing act, even though the averments of the first indictment did not actually allege the commission of the crime on the day and times specified in the second indictment, but the second indictment showed plainly that the acts therein set forth were of a likely nature and had actually been consummated before the first indictment had been found, and for that reason as stated in *Rex* v. *Ebington*, 9 Cox Crim. Cases 86: "The prose-

cutor may carve as large an offense out of the transaction as he can, but he must cut only once."

The question of whether an indictment charges one offense or several separate offenses depends upon the nature of the transaction set forth. There are three well defined lines of cases.

First, when the offense is a continuous act or series of acts, the gist of each being the evasion of but one law, there can be but one prosecution for any or all of such acts.

Second, where the commission of an act or several acts is not necessarily included in other acts although enacted closely together and each act apparently the duplicate of the other, but the distinction being that each act was complete in itself and wholly consummated without aid or without proof of the other acts.

Third, where by one act a crime is committed against several persons or against the property of more than one person with but one intent and object or purpose in view by the party committing said act. It has been uniformly held in such cases that but one offense has been committed, subject to but one punishment.

It is the contention of respondent that the case *sub judice is of the first class.* It has been held by this court and by other well considered and learned opinions that there is but one offense subject to one prosecution and one punishment and that within the maximum prescribed by the statute under which prosecution is had.

Ex parte Snow, 120 U. S. 274.
Ex parte Hans Nielsen, 131 U. S. 176.

Morey v. *Commonwealth*, 108 Mass. 433.
Micekenfuse v. *Tex.*, 55 Tex. Cr. 229.
Commonwealth v. *Robinson*, 126 Mass. 259.
Commonwealth v. *Jenks*, 1 Gray. 490.
Commonwealth v. *Hudson*, 14 Gray. 11.
Crepps v. *Durden, Cowper* (K. P.) Pt. 2, p. 640.
Washburn v. *McElroy*, (1810) 7 Johns 134.
Mayor v. *Ordreman*, (1815) 12 Johns 122.
Tiffany v. *Driggs*, (1816) 13 Johns 253.
U. S. v. *McCormick*, (1830) 4 Cranch (C. C. 104).
State v. *Nutt*, (1856) 28 Vt. 598.
State v. *Lindley*, (1860) 14 Ind. 430.
Sturgis v. *Spofford*, (1871) 45 N. Y. 446.
Fisher v. *N. Y. Central & H. R. R. Co.*, (1871) 46 N. Y. 644.
State v. *Egglesht*, (1875) 41 Ia. 574.
U. S. v. *N. Y. Guar. & Ind. Co.*, (1875) 8 Ben. 269.
U. S. v. *Erie Ry. Co.*, (1877) 9 Ben. 67.

Under the second class where one act or several acts are included in other or similar acts performed closely together, but each act is a complete crime within itself and wholly consummated without aid or proof of the other acts, it is admitted that such crimes may be separate offenses and have been so construed by this and other courts, *but the case at bar is not of this class*, for in every count of the indictment it was not only necessary to allege that the respondent James Daugherty was required to register and failed to register before July 1, 1922, and pay the annual tax for the fiscal year, but it was incumbent upon the prosecution only to prove that the respondent failed so to register and pay the particular tax and the prosecution was then at liberty

to prove one sale or a dozen sales on a day certain or any day or days, during the one space of time, namely, between July 1, 1922 and June 30, 1923. And the reason as heretofore stated is that the gravamen of the offense is the failure to register and pay the annual license tax for the fiscal year ending June 30, 1923, before engaging in the business, whether the said business be large or small. There was but one tax and once having paid the same the respondent was authorized to do as much business as possible and it is therefore clearly seen that we are back to the one idea, this is solely a revenue statute.

The case at bar does not fall under this second class of cases ~~as~~ a close examination of the following cases, will disclose showing the necessary distinctions and these cases are merely called to this Honorable Court's attention to show that distinction.

Morgan v. *Devine,* 237 U. S. 632.
Ebeling v. *Morgan,* 237 U. S. 625.

In the Morgan case, *supra,* there were two separate and distinct crimes set forth in the indictment, first, the breaking and entering into a United States Post Office; second, a larceny from the United States and the court held that the breaking and entries were completed and a punishable offense fully consummated before there was any stealing and carrying away of the government's property. Either of these offenses could have been fully charged and fully proved without regard to the other, the breaking and entering being punishable under one statute and the larceny being punishable under an entirely different statute.

It would have been possible to have entirely proven the breaking without a word of testimony regarding the larceny and vice versa. The larceny charge might have been fully supported without mentioning the actual breaking and entering.

Likewise, in *Ebeling* v. *Morgan, supra,* there were charges of stealing a number of mail pouches and cutting and tearing and mutilating of one specific mail pouch and the mutilating of four other pouches, although all five pouches had been stolen at the one time. Here there was no intent necessary. The act of cutting is *malum prohibitum,* and tearing and cutting a pouch was a separate offense under the statute as a proof of cutting and mutilating one pouch would be complete without regard to the cutting of another pouch or pouches. The distinction can be drawn very clearly by the fact that if the prosecutor had elected to charge the larceny of each separate bag when they were all stolen at one time with one intent, the court would have been forced to hold that the one act of stealing the five pouches was but one offense subject to one charge and one punishment while the separate acts of cutting separate pouches were separate offenses subject to separate charges and separate punishments.

It will be readily seen that the case at bar is not a case of this nature because in each count there must be alleged the same facts, to-wit, failure to register and pay the tax for the fiscal year ending June 30, 1923, and in each count this failure to pay the tax must be proved and a dozen or more sales could be proved to

show the accused was a dealer and was doing business in narcotic drugs.

Third, we come to the class of cases where by one act, a crime is committed against several persons or against the property of more than one person but with one criminal intent. There could be but one prosecution and punishment because these cases usually are found to be the common law offenses often enacted into statutory law where intent is the gravamen of the offense. *Of course, it must be admitted that each act could be made an offense if the statute so ordered but unless so stated the statute will be given its common law meaning.* Nothing will be read into a criminal statute that is not clearly stated therein. The present case could not fall in this class of cases for the reasons: (A) *Intent is not a part of the statute;* (B) *The statute fails to state that each sale or transaction will be a separate offense and the act of December* 17, 1914, unequivocally provides that the only offense punishable thereunder is the failure to annually register and pay the revenue tax for the fiscal year.

Respondent cites this line of cases so that this Honorable Court may consider and distinguish the three classes referred to from every angle.

State v. *Douglas*, 26 Nev. 196.
Ward v. *State*, 90 Miss. 249.
State v. *Warren*, 111 Md. (Old No. 77) 121.
Peck v. *State*, 54 Tex. Crim. Rep. 121.
Emiles v. *U. S.*, 3 *McArthur*, (D. C.) 370; 36 Am. St. Rep. 106.
Smith v. *State*, 59 Ohio St. 350; 52 N. E. 826.

In the case of *Hurst* v. *State,* 86 Ala. 604, a statute made it an offense to introduce a file into a jail with intent to facilitate the escape of a prisoner. If the escaping prisoner was serving a term for a misdemeanor, the act of delivering the file into the jail would be a misdemeanor and if the prisoner were held for a felony the act would be a felony. A prosecution was first had under the misdemeanor statute and then an attempt was made to prosecute for a felony, after two prisoners were aided in escaping, one held for misdemeanor and one for a felony but the court adopted the well established rule that a prosecutor could carve out of the facts as large an offense as the facts would support but that he could cut but once.

The Federal Courts have adopted this principle of oneness, especially with respect to offenses of inducing the immigration of contract labor into the United States.

U. S. v. *N. Y. Central and H. R. R.,* 232 Fed. 179,

the court saying at page 184, "If there was but one solicitation, all one act, the defendant incurred but one penalty."

It was held in the case of *Standard Oil Company* v. *U. S.,* 164 Fed. 376, that a separate conviction could not be had and a separate fine assessed for each carload shipped in violation of the illegal concession and rebate laws.

Also in *U. S.* v. *Patty et al.,* 2 Fed. 664, it was held that where one person mailed hundreds of lottery cir-

culars there could not be a prosecution on each circular mailed but that a mailing constituted but one offense.

Other citations supporting the general rule are:

State v. *McClung*, 35 W. Va. 280.
Yarbrough v. *State*, 86 Ga. 396.
Commonwealth v. *Birdsall*, 69 Pa. 482; 8 Am. Rep. 283.
Roberts v. *State*, 55 Miss. 421.
Triplett v. *Commonwealth*, 84 Ky. 193.
Jennings v. *Commonwealth*, 165 Mass. 586.
Lyons v. *People*, 68 Ill. 271.
Commonwealth v. *Lavery*, 149 Mass. 67; 20 N. E. 697.
State v. *Nichols*, 37 La. Ann. 779.
Reese v. *State*, 12 Ohio, 146.
Munsen v. *McClaughry*, 198 Fed. 72.
Stevens v. *McClaughry*, 207 Fed. 18.
Halligan v. *Wayne*, 179 Fed. 112.

It is respectfully submitted that the indictment in the case at bar charged but a single offense, subject to a single prosecution, to-wit, that the respondent, James Daugherty, could legally have suffered but one judgment of a sentence within the maximum provided by Section 9 of the Act of December, 1914, and the amendments thereto, namely, imprisonment not exceeding five years and a fine not exceeding two thousand dollars ($2,000); that the sentence of the District Court was beyond its jurisdiction and it is contended that the finding of the Circuit Court of Appeals for the Eighth Circuit should be sustained, not only because said sentence failed to state the sequence in which the three five-year terms should be served but because the indictment against the respondent James Dougherty charged but

one offense against the revenue laws of the United States and that charge was that said respondent Daugherty engaged in the business of selling narcotic drugs during the fiscal year ending June 30, 1923, *without first having registered and paid the tax or license required* by *said revenue law.*

It must be admitted that Congress set the period of time, namely, one year and made it one offense to do a certain business during that period without a license or permit; that there is no idea conveyed in said statute *that each sale will be a separate offense.* There is no limit on the number of sales to be made during the year or limit on the quantity of drugs to be sold.

This Honorable Court has held that this particular Act of Congress was denominated a revenue statute to give it a semblance of constitutionality but this covering will not submit to too close an examination or the false bottom will be discovered. It is submitted that if at the time the indictment was drawn the pleader knew a number of continuing acts had been committed, he was bound to plead all as one offense or elect to abandon those not pleaded.

Hans Nielsen, 131 U. S. 174.
Ex parte Snow, 120 U. S. 274.
Morey v. *Commonwealth,* 108 Mass. 433.
Hurst v. *State,* 36 Ala. 604.

D. Because for the indictment in this case to charge more than one separate and distinct felony would be in violation of the Fifth Amendment to the Constitution of the United States.

The respondent contends that the District Court was without jurisdiction to try him for more than one infamous crime at one trial and *if it is insisted that each of said three counts in the indictment charged separate felonies the entire indictment is void and the judgment a nullity because such an indictment would be contrary to the provision of the Fifth Amendment to the Constitution of the United States.*

It is realized that the indictment was drawn under Section 1024 Revised Statutes of the United States but that section clearly attempts to do what the Fifth Amendment guarantees cannot be done by Congress or by a Federal Court and the Statute was enacted by Congress without power or constitutional authority.

Let us consider that portion of the Fifth Amendment which provides "No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or *indictment of a grand jury*" (Italics ours). The mandates of the United States Constitution are simple and direct, just as the Ten Commandments are simple and direct. There is not a wasted word in the entire document. It is drafted as passionless as a problem in mathematics and every word therein has a well defined meaning. It is worthy of consideration, that in the Convention of 1787 and in the Congress of the United States which drafted the first ten Amendments (the People's Bill of Rights), a great number of the

lawyers and statesmen taking part therein had been educated in English colleges and universities and studied the English common law. To most of these lawyers Blackstone was their Moses in law and Mentor. The Colonial institutions, legislative and judicial, were built on the English law. Every judge and lawyer used a Blackstone as the one and only law dictionary and every phrase and word used in the Constitution was used in the light of the definitions that such phrase and words had at common law then in force. Madison, who *actually* drafted the first ten Amendments used words in their English common law definitions with all the legal limitations attached to such words. The mighty Henry worried about what was to become of the common law. As Mr. Beveridge says in his great book, the Life of John Marshall, Vol. I, p. 440:

> "Henry, as usual, was vivid. He thought that, without a bill of rights, ' excise men may come in multitudes—go into your cellars and rooms and search, and ransack and measure, everything you eat, drink and wear.' And the common law! The Constitution did not guarantee its preservation. 'Congress may introduce the practice of the civil law, in preference to that of the common law—we are then lost and undone.' "

Therefore when applying or interpreting the phrases and words of this great document, we must look to the common law as then understood for definitions and we cannot give present day meanings to words used therein which would alter the express ideas and thoughts of

its framers and express new thoughts and ideas never dreamed of by them.

U. S. v. *Hudson*, 7 Cranch 32.
Ex parte Grossman, 45 Sup. Ct. 332.
United States v. *Ashe*, 2 Fed. (2nd) 735.
United States v. *Wilson*, 7 Pet. 150.
Ex parte Wiliam Wells, 18 Howard 307.

Considering these things let us look at the word "indictment." Without any attempt to define same it was placed in the Fifth Amendment. We must be guided solely by the meaning of the word at common law as of that day and time understood, and Congress has no power to enact a law which would change the definition of this word or any word or phrase in the Constitution.

The imperative requirements of the provisions of the Constitution would be of little avail if Congress could derogate the meaning expressed by the word indictment until it lost its force and effect. First, they might hold that an indictment could be voted by half a dozen grand jurors, and then enact a law that an indictment might be the findings of three charges; and finally if the definition could be twisted about in such fashion, a law might be enacted that would entirely remove the distinctions between indictments and informations. In this indirect manner of changing the Constitution, Congress might authorize indictments to be found without producing witnesses before a grand jury and not only the word "indictment" might be so changed as to in nowise resemble the original meaning when incorporated in the Constitution, but every common law phrase used by the framers might be so changed as to entirely wipe out the supreme law of the land.

In *ex parte Grossman, supra,* this Honorable Court, speaking through Mr. Chief Justice Taft said:

> "The language of the Constitution cannot be interpreted safely except by reference to the common law and to the British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen states were born and brought up in the atmosphere of the common law and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law, in a compact draft, they expressed them in terms of common law, confident that they could be shortly and easily understood."

And it might be added that an English speaking people, born and reared under English institutions and English common law, did understand and accept the Constitution as built almost entirely in the familiar common law and especially the first ten amendments (modeled after the English Bill of Rights).

In *United States* v. *Wilson, supra,* that greatest of all constitutional jurists, Chief Justice Marshall held:

> "After this power has been exercised from time immemorable by the executive of that nation (England) whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon (*the question of the definition of pardon used in the Constitution being at issue*) (Italics ours) and look into their books for the rules prescribing the manner in which

it is to be used by the person who avails himself of it."

In *ex parte Wells, supra,* Mr. Chief Justice Wayne remarked:

> "* * * The language used in the Constitution * * * must be construed with reference to its meaning at the time of its adoption. * * * Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in its various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England. * * * At that time both Englishmen and Americans attached the same meaning to the word 'pardon.' In the Convention which framed the Constitution no effort was made to define or change its meaning."

The same argument can be used with equal force, and it is unquestionably sound, relative to the things that were in the mind of the Congress that drafted the Fifth Amendment, no effort was made to define or change the word "indictment" because it had a well defined meaning to the drafters and to the whole people, who accepted and ratified that amendment, which meaning had stood from time immemorable and this word which had grown from its first introduction into English (about 1084) and which the framers of the Constitution used in its legal sense cannot be lightly changed by a Congress that has no power to amend the Constitution.

Supported by this authoritative background as to how the word "indictment," as used in the Constitution, should be construed, we next consider indictment as a legal term used at common law at the time said word was introduced into the Fifth Amendment. In the case of *United States* v. *Ashe, supra,* Judge Thompson said:

> "I think it may be definitely stated that under the common law of England in the Eighteenth Century, the trial of two indictments for distinct offenses before the same jury was wholly unknown. It appears to have been permissible in misdemeanors to join in one indictment several counts which might include different offenses, or different aspects of the same transaction, such as larceny and receiving stolen goods. In such cases, however, the court at the trial exercised its right and duty either to quash the indictment or to put the crown upon its election which one it would try in order that the prisoner might not be confounded in his defense, and the jury distracted. In cases of felony the rule was very strict. It was permissible to charge separate and distinct counts for felony, provided they were different phases of the same transaction. But, if it appeared that different counts charged separate and distinct felonies, it was the duty of the court to quash the indictment or to require the crown to elect."

In *McElroy* v. *U. S.*, 164 U. S. 76; Mr. Chief Justice Fuller stated:

> "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury or otherwise, that it is the settled rule in England and in many of

> our states to confine the indictment to one distinct offense."

In *State* v. *Nelson,* 8 N. H. 163, it was said:

> "No court ever permits a prisoner to be tried for two distinct and separate crimes upon one indictment."
>
> *Young* v. *The King,* 3 D. & E. 98.

In *Regina* v. *Giddins,* Car. & Mar. p. 634, the defendant was charged with assaulting and robbing two men who were walking together at the time of the assault. Motion was made to put the prosecution on election, Justice Lindle said:

> "I think the counsel for the prosecution is not to be put to election. It is all one act in one transaction. The two prosecutors were assaulted at one and the same time and there was no interval of time between the assaulting and robbing of one, and the assaulting and robbing of the other. The one act was charged in one count only. If there had been an interval between the felonies, it would have been distinct; but that is not so in the present case."

The Earl of Halsbury's Laws of England, Vol. 9, page 842, state:

> "At common law there was no legal objection to several different felonies being charged in different counts in one indictment but it is a well established rule that if different felonies, not being different ways of describing the same act, are charged in separate counts of one indictment, the judge will put the prosecution to his election to proceed and offer evidence on one charge only." (Citing cases in support of this law.)

Wharton's Criminal Practice, Section 34, says:

> "As to offenses of high grade in all states and in some states as to all offenses, the court will not permit more than a single issue to go to the jury and hence will require an election at the close of the prosecution's case, except in those cases in which offenses are so blended that it is imminently for the jury to determine which count it is that the evidence fits (here it is clearly indicated that there can be but one verdict). The object of the rule is, first, to enable the defendant to properly prepare for his defense and, secondly, to protect him by an individualization of the issue in case a second prosecution is brought against him."

In Joyce on Indictments, Second Ed., Section 571, it is said:

> "It is a rule of the common law • • • that where there are several counts in an indictment charging the defendant with more than one distinct and separate felony, the court may at its discretion either require an election by the prosecutor as to the count upon which he will proceed or in the clear case quash the indictment."
>
> *State* v. *Blakeney*, 96 Md. 711.
> *State* v. *McNally & Meyers*, 55 Ind. 559.
> *Kane* v. *the People*, 8 Wend. (N. Y.) 203.
> *People* v. *Goldner*, 128 N. Y. S. 375.
> *McKenzie* v. *State*, 32 Tex. 575.
> *Mangrall* v. *State*, 1 Ala. App. 189.
> *Strawhern and Grizzle* v. *State*, 37 Miss. 428.

If there be a single case in all England where a person has been tried upon two indictments for two separate and distinct capital or infamous crimes before the same jury and court, at the same time, and such a procedure has been sustained on authority of the common law, no record thereof can be found.

The reason for this rule is based on a consideration of humanity and the solicitude for human life and liberty. From that same humane source have come all the safeguards which the law has thrown around an accused person, *viz.*, the presumption of innocence; the requirements of proof of guilt beyond a reasonable doubt; the right of the accused to be heard and to be represented by counsel; the right to demand the nature of the accusation against him and to meet the witnesses face to face and to have compulsory process for their appearance; to have a speedy public trial before an impartial jury; that he be not compelled to give evidence against himself, nor be deprived of his life, liberty or property, unless by judgment of his peers and the law of the land. Such were the rights of the citizens of England and of the Colonies under the common law in force at the time the Fifth Amendment was drafted and they were incorporated in the United States Constitution and its first ten amendments—standing then, it should stand now as the birthright to every citizen of this great nation.

It is contended without hesitation that the indirect method used by Congress in enacting Section 1024, Revised Statutes must be abrogated by the guarantee contained in the Fifth Amendment.

Congress cannot change the definition of words written into our Constitution, for this would in effect be changing or amending that document which cannot be done by Congress directly or indirectly.

It has been well stated in the authorities cited that the rule requiring separate indictments and awarding

separate trials for distinct felonies is based on the fact that a joinder of distinct charges tends to confound the prisoner in his defense, hold him out as an habitual criminal, distract the minds of the jurors and prejudice him as to his challenges. So clear a proposition needs little elaboration and it is, therefore, but just and proper for all courts to recognize and maintain these sacred rights under all conditions.

If it could be maintained that Section 1024 is constitutional it can only be considered as an aid to judicial procedure. It is not substantive law. First, this statute makes no attempt to authorize separate sentences. Second, this statute in nowise authorizes the suspension of a sentence imposed for the purpose of forcing a prisoner to serve a prior sentence before the one imposed becomes operative. Third, the statute does not deviate from the well settled rules of the common law nor does it define or change the well established principles that when more than one sentence is imposed that unless the sequence in which said sentences shall be served is definitely and positively stated all said sentences shall take effect and run concurrently. Therefore, this statute does not authorize more than one sentence upon each conviction under one indictment.

We must remember there are no common law offenses against the United States. Criminal law in the Federal Courts is entirely governed by statutes and

this principle has been too firmly established to require more than a few citations:

U. S. v. *Hudson,* 7 Cranch 32.
Ex parte Grossman, 45 Sup. Ct. Rep. 332.
U. S. v. *Briton,* 108 U. S. 199.
U. S. v. *Eton,* 144 U. S. 677.

Mr. Chief Justice Taft in *ex parte Grossman, supra,* l. c. 335, stated:

> "The legislative authority of the Union must first make an act a crime, and affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

It must be admitted that another principle of criminal law is too well settled to require much distinction and but a few authorities will be here cited in support of the contention that criminal statutes must be strictly construed, that nothing, not clearly stated, in such a statute can be read into it. It cannot be enlarged by interpretation, intendment, analogies or equitable considerations and if there be any doubt as to the meaning or if said statute is susceptible of two meanings, that meaning which is most favorable to the accused must be adopted. Such a rule is founded upon the principle that where the Legislature had in its power to make a statute clear and unambiguous, there can be no complaint if it is read strictly against the Government.

United States v. *Morris,* 14 Pet. 464.
U. S. v. *Sheldon,* 2 Wheat 119.
In re: *McDonough,* (D. C.) 49 Fed. 360.
U. S. v. *Beatty, et al.,* 487 Fed. cases, No. 14,555.
U. S. v. *Wilson,* Bldw. 78 Fed. Case 16379.
U. S. v. *Wiltberger,* 5 Wheat 76.
State v. *Wallace,* 102 Me. 229.

It was said in *State* v. *Wallace, supra*:

> "This rule means that, in the first place, since the power of punishment is vested in the Legislative Department of the Government and not in the Judiciary (see *State* v. *Woodward*, 368 N. J. Law 89), statutes which create, define, and describe the punishment for criminal offenses are to be interpreted according to their strict import, and not so extended by implication or construction as to create crimes or penalties; or as expressed by some courts, such laws must not be strained by construction to spell out new offenses, enlarge the field of crime or multiply felonies or penalties."
>
> *People* v. *Biggs*, 193 N. Y. 357.
> *Shaw* v. *Clark*, 49 Mich.

What the Legislature has, from inadvertence, or otherwise, omitted to include within the express provision of a penal law, reasonably construed, the courts cannot supply.

> *State* v. *Finch*, 37 Minn. 433.
> *Shalling* v. *State*, 115 Ind. 300.
> *U. S.* v. *Huggett*, 40 Fed. 636.
> *Law* v. *Kellenir*, 25 N. J. L. 522.
> *State* v. *Peabody*, 103 Me. 327.
> *Wright* v. *Commonwealth*, 109 Va. 846.
> *Martin* v. *U. S.*, 168 Fed. 198.
> *Erbaugh* v. *U. S.*, 173 Fed. 433.

Considering that the District Court had no common law jurisdiction to impose more than one sentence; we find the respondent James Daugherty sentenced by the trial judge to serve a separate term of five years on each of three counts in one indictment when there was but one plea to one issue, i. e., "guilty in the manner and form as in said indictment he is charged" (R. 4).

Whereupon, the trial court separated the plea to cover three issues, one on each count in the indictment and attempted to impose three separate terms of five years in the United States penitentiary. Whereas the statute set the maximum penalty at not more than five years in the penitentiary and a fine. This being a Federal Court, we ask where the trial court procured jurisdiction to enter such a sentence? Where is the Federal Statute that would authorize such a sentence? If the petitioner cannot show a positive statute, unambiguous, directly giving this Federal Judge power to so divide the indictment into separate crimes and so sentence, there is no such right. It cannot be done under the common law and further, in the United States Courts, there must be legislative authority for all criminal offenses. *Ex parte Grossman, supra.*

The only answer of the petitioner is Section 1024 of the United States Revised Statutes. The petitioner concedes that its power is either derived from this section or it has no such power. There must, therefore, *be a proper interpretation of this Section* 1024 *of the Revised Statutes.* One perfect answer is that the United States courts are divided in their interpretation of it. It must therefore be admitted that the statute is ambiguous. If the learned judges of these courts cannot agree among themselves that said law expresses a plain legislative intent giving Federal Judges the power and jurisdiction to assess fines on each count in an indictment and to further impose cumulative sentences under one indictment in excess of the maximum of the statute under which said prosecution is had, how can it

be said that the statute measures up to the requirements hereinbefore set out regarding the definiteness of criminal statutes? It might be well to here state that it is a noticeable fact that the Federal Judges throughout the eastern part of the United States rarely, if ever, assess a sentence in excess of the maximum of a statute, regardless of the number of counts. Section 1024 provides:

> "When there are several charges against any person for the same act or transaction
>
> or
>
> two or more acts or transactions connected together,
>
> or
>
> for two or more acts or transactions of the same class of crimes or offenses which may be properly joined • • • the court may order them to be consolidated."

Thus we see that there is a compound subject of three equal and correlative clauses with but a single predicate and that Congress intended each class of cases set forth in the respective clauses to rest upon but one predicate. There was no idea, if so, Congress failed to express it, that the cases set forth in one clause and consolidated for trial would be subject to but one punishment after trial and the cases set forth in another clause to be treated entirely different, *i. e.*, consolidated for trial and separated for sentencing. That this court has uniformly held, and there has never been any ques-

tion regarding the cases in the first clause, "charges against a person for the same act," they are subject to but one punishment, is admitted by all.

Ex parte Snow, 120 U. S. 274.
Ex parte Hans Nielsen, 131 U. S. 174.
Morey v. *Commonwealth,* 108 Mass. 43.
Hurst v. *State,* 68 Ala. 604.
United States v. *N. Y. Central H. R. R.,* 232 Fed. 179.
Standard Oil Company v. *U. S.,* 164 Fed. 376.
United States v. *Patty, et al.,* 2 Fed. 664.
B. & O. S. W. R. R. v. *U. S.,* 220 U. S. 94.
United States v. *International Silver Co.,* 255 Fed. 694.
State v. *Douglas,* 26 Nev. 196.
State v. *Warren,* 111 Md. (Old No. 77) 121.
Cohen v. *State,* 42 Ind. 420.
Woodford v. *People,* 62 N. Y. 117.
Regina v. *Truman,* 8 Car & P. 727.
Bar v. *State,* 22 Ala. 9.

Can it be possible that the cases alluded to in the third clause of this one sentence are to be treated differently? If that be true, then certainly this statute is ambiguous. It is beyond a doubt susceptible of at least the meaning that would be most favorable to the accused, that is, that Congress meant to wipe the slate of the accused person clean of a number of similar offenses by one trial, either acquit him or convict him in one trial and save the Government the expense of a multiplicity of trials, it certainly being within the knowledge of the Government that it would be much easier to convict a person before the average jury if he were accused of a number of offenses as the jury might well have in mind that where there is so much smoke there

must be some fire. His position as an habitual criminal would stand out and while the jury might not be willing to convict on one of the charges standing alone for lack of sufficient evidence on that particular count, they might by taking the evidence as a whole readily reach a general verdict of guilt. Congress did not intend that the accused should not receive some consideration for this advantage given to the prosecution but it plainly intended that the accused would be subject to but the maximum penalty of the class of cases under which he was jointly tried. If this were not the intent and the cases were merely to be consolidated for trial and then separated for sentence, why would Congress limit the consolidation to offenses of the same class or crime?

Why not consolidate any and all kinds of offenses, regardless of class or grade? It is manifest that felonies are classed and graded solely by the severity of the punishment and we have before us a statute which in effect reads that felonies that are punishable by the same punishment may be consolidated, and yet counsel for petitioner would attach no particular significance to this feature of the statute. It is clear that this statute means that where the punishment of felonies is the same, offenses may be consolidated because in such cases the court will not be confused as to punishment as the punishment would be within the maximum of the statute for that class of cases. The advantage to the Government in joining offenses in one trial is clearly demonstrated when a person was actually guilty of one of the offenses and not guilty of the other and would be afraid to take the stand in defense of the counts of which he was

not guilty because he would be forced to admit his guilt on the count where he was guilty. Under such circumstances, he should be given some concession and the statute in question ably protects him in that he will suffer but one punishment even if convicted on all counts.

If this idea of only one sentence is dubious under this statute, the doubt should be resolved in favor of the accused because Congress is responsible for the ambiguity of its meaning. It could have stated in clear and concise words that the consolidation was merely for trial, that the trial judge could sentence for each offense or count upon which a verdict of guilty was rendered and remove all doubts. Also it must be remembered that there is no precedent of the common law to justify separate sentences under one indictment and if Congress was at that time introducing a new idea in criminal procedure, the words creating, defining and describing this intent should have been carefully selected and the added penalties definitely expressed. Otherwise, the interpretation will be by the scale of the common law.

Conclusion.

The respondent respectfully submits that the Circuit Court of Appeals did not in this case fall into grave error and acted within its proper authority in holding that the respondent received a sentence of but five years instead of the fifteen years which the trial court attempted to impose. First, because the sequence in which the three five-year terms were to be served was not clearly

and definitely stated. Second, because the District Court in this case had no power, authority or jurisdiction to impose cumulative or consecutive sentences for the reasons heretofore set out under Points A. B and C.

It is therefore respectfully submitted that the ruling of the Circuit Court of Appeals for the Eighth Circuit in this case should be sustained and that the respondent for all of the reasons herein set out be compelled to serve but five years upon the sentence as entered, unless, under Argument II, subdivision "D," this Honorable Court should hold that the respondent was charged in one indictment with three separate and distinct felonies, in which case, it is respectfully submitted that the respondent should be discharged from further confinement, because the indictment would, therefore, be void and the imprisonment of respondent under it in violation of the Fifth Amendment to the Constitution of the United States.

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